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EXAMINER

COLE, ELIZABETH M

ART UNIT

PAPER NUMBER

1794

MAIL DATE

DELIVERY MODE

03/27/2009

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/651,676

Applicant(s)

KELLY ET AL.

Examiner

Elizabeth M. Cole

Art Unit

1794

Period for Reply -- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 14 January 2009.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-3, 6-8 and 10-17 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-3, 6-8 and 10-17 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/S5108)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 1/14/09 has been entered.

2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

1. Claims 1-3, 11, 13-14, are rejected under 35 U.S.C. 103(a) as being unpatentable over Suda et al, U.S. Patent NO. 5,078,710 in view of Langdon, U.S. Patent No. 5,500,270. Suda et al discloses a composite topsheet for use with an absorbent core and an impermeable backsheet comprising a first layer comprising a plurality of apertures, (see figure 15, element 4), which further comprises a plurality of discrete macrofeatures, wherein the macrofeatures comprise apertures in the sidewalls. A nonwoven layer can be disposed on either surface of the apertured film layer. See col. 2, lines 24-29; col. 5, line 48 – col. 6, line 54. Both layers are fluid permeable. All of the apertures are substantially separate from the second layer. The tops of the macrofeatures are substantially planar. A layer of nonwoven fibers can be deposited on the surface of the first layer so that the body side layer would be a nonwoven fabric in this embodiment. See col. 2, lines 23-26. Suda et al teaches that the height of the

surface material should be 0.1-5 mm which encompasses the claimed height. See col. 3, lines 57-62. Suda et al differs from the claimed invention because it does not teach that both layers are film layers. Langdon discloses a laminate material. The first and second layers of the laminate material can be independently nonwoven webs, film, microporous sheets, porous sheets, etc. The first and second sheet can be apertured. See col. 3, lines 3-22. A plurality of spacer elements which correspond to the claimed projecting macrofeatures are disposed between and attached to the first and second layers. The spacers can either be adhesively or thermally bonded to the layers or can be cast as part of the layers. See col. 7, lines 1-16. Therefore, Langdon teaches forming a composite coversheet for absorbent articles that the two layers can be either nonwovens, films, or porous or microporous sheets. Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to have employed a film as the second layer in Suda rather than a nonwoven layer as the second layer of the composite topsheet in Suda, in view of the teaching of Langdon that nonwovens and film are recognized in the art to be equivalent, known materials for use for this purpose.

2. Claims 6-8, 12, 15-17 are rejected under 35 U.S.C. 102(b) as being anticipated by Suda et al, U.S. patent No. 5,078,710. Suda et al discloses a composite topsheet for use with an absorbent core and an impermeable backsheet comprising a first layer comprising a plurality of apertures, (see figure 15, element 4), which further comprises a plurality of discrete macrofeatures, wherein the macrofeatures comprise apertures in the sidewalls. The base of the macrofeatures contacts the top surface of the second layer

of the composite topsheet which maybe a nonwoven layer. See col. 6, lines 43-67.

Both layers are fluid permeable. All of the apertures are substantially separate from the second layer. The tops of the macrofeatures are substantially planar. . A nonwoven layer can be disposed on either surface of the apertured film layer. See col. 2, lines 24-29; col. 5, line 48 – col. 6, line 54. Suda et al teaches that the height of the surface material should be 0.1-5 mm which encompasses the claimed height. See col. 3, lines 57-62.

3. Claim 10 is rejected under 35 U.S.C. 103(a) as being unpatentable over Suda et al, U.S. Patent No. 5,078,710 in view of Langdon, U.S. Patent No. 5,500,270. Suda et al discloses a composite topsheet for use with an absorbent core and an impermeable backsheet comprising a first layer comprising a plurality of apertures, (see figure 15, element 4), which further comprises a plurality of discrete macrofeatures, wherein the macrofeatures comprise apertures in the sidewalls. The base of the macrofeatures contacts the top surface of the second layer of the composite topsheet which maybe a nonwoven layer. See col. 6, lines 43-67. Both layers are fluid permeable. All of the apertures are substantially separate from the second layer. The tops of the macrofeatures are substantially planar. . A nonwoven layer can be disposed on either surface of the apertured film layer. See col. 2, lines 24-29; col. 5, line 48 – col. 6, line 54. Suda et al teaches that the height of the surface material should be 0.1-5 mm which encompasses the claimed height. See col. 3, lines 57-62. Suda et al differs from the claimed invention because it does not teach that the first layer is a nonwoven fabric. Langdon discloses a laminate material. The first and second layers of the laminate

material can be independently nonwoven webs, film, microporous sheets, porous sheets, etc. The first and second sheet can be apertured. See col. 3, lines 3-22. A plurality of spacer elements which correspond to the claimed projecting macrofeatures are disposed between and attached to the first and second layers. The spacers can either be adhesively or thermally bonded to the layers or can be cast as part of the layers. See col. 7, lines 1-16. Therefore, Langdon teaches forming a composite coversheet for absorbent articles wherein the two layers can be either nonwovens, films, or porous or microporous sheets. Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to have employed a nonwoven as the first layer in Suda, in view of the teaching of Langdon that nonwovens and film are recognized in the art to be equivalent, known materials for use for this purpose.

4. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

5. Claims 1-3, 6-8, 10-16, 17 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1, 3-4, 10-11, 14-16, 18-19, 22-27, 29-31 of copending Application No. 10366,051. Although the conflicting claims are not identical, they are not patentably distinct from each other because each discloses a two layered apertured structure having macrostructures which extend from one layer to the other layer, wherein both layers are fluid permeable.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

6. Applicant's arguments filed 1/14/09 have been fully considered but they are not persuasive. Applicant argues that the body side layer of Suda which can be a nonwoven layer would contact the surface opposite Suda's wall sections. However, Suda teaches that a nonwoven layer can be disposed on either surface of the apertured film layer. See col. 2, lines 24-29; col. 5, line 48 – col. 6, line 54. Therefore, at least the nonwoven facing the absorbent core would contact the apertured film layer at selected areas between disconnected macrofeatures. The claims do not require that the two layers only contact each other at selected areas between the disconnected macrofeatures.

7. With regard to the 102 rejection of claims 6-8, 12, 15-16, Applicant argues that Suda does not teach either apertures spaced apart from the second layer or contact between the two layers at selected areas between disconnected macrofeatures. However, Suda teaches apertures spaced apart from the second layer because the apertures are present in the sidewalls of the macrofeatures. Further, Suda teaches that

a nonwoven layer can be present on either surface of the apertured film layers. .See col. 2, lines 24-29; col. 5, line 48 – col. 6, line 54. The claims do not require that the two layers only contact each other at selected areas between the disconnected macrofeatures. Therefore, Suda anticipates the claimed invention.

8. Applicant's argument that Langdon does not teach the claimed feature of contact between the two layers at selected areas between the disconnected macrofeatures is persuasive and the rejection over Langdon is withdrawn.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Elizabeth M. Cole whose telephone number is (571) 272-1475. The examiner may be reached between 6:30 AM and 6:00 PM Monday through Wednesday, and 6:30 AM and 2 PM on Thursday.

The examiner's supervisor Rena Dye may be reached at (571) 272-3186.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

The fax number for all official faxes is (571) 273-8300.

/Elizabeth M. Cole/
Primary Examiner, Art Unit 1794

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